

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7513

Petition of Department of Public Service to impose penalties)
and other remedial action upon Vermont Gas Systems, Inc.)
("VGS"), re: probable violations of Vermont law, pertaining)
to gas safety, involving 31 separate locations installed,)
owned, operated and/or maintained by VGS)

Order entered: 10/23/2009

ORDER RE: MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

In this Order, I rule upon a motion for summary judgment and a motion to dismiss submitted by Vermont Gas Systems, Inc. ("VGS" or the "Company") in response to a Notice of Probable Violation ("NOPV") issued to the Company by the Vermont Department of Public Service (the "Department") on February 27, 2009.¹ The NOPV seeks to impose \$51,000 in fines on VGS based on 31 counts of alleged violations by VGS of several federal natural-gas safety code standards.² The alleged violations state that VGS at various times has failed to properly install, monitor and maintain certain segments of natural-gas pipes, customer meters and regulators in its service territory in Vermont.

1. The NOPV consists of a letter addressed to VGS and signed by Hans Mertens, the Director of Engineering for the Department. This nine-page letter contains a summary description of a course of dealings between the Department and VGS that led to the filing of the NOPV, as well as a detailed recitation of gas safety rules and regulations, each prefaced by an explanation of the Department's interpretation of that particular provision of law. The NOPV further includes a data spreadsheet enumerating the 31 counts against VGS, as well as an attached sheaf of 31 colored photographs, each labeled with an identification number that correlates to a count itemized in the data spreadsheet. The data spreadsheet contains eight data columns bearing the following titles: "ID Photo," "Installation Date," "Address," "Note," "Inspection Date," "Code Violation," "Violation Description," and "Proposed Civil Penalty."

2. Each of the 31 counts is founded on two different provisions of Title 47 of the Code of Federal Regulations, Part 192 - Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards (hereinafter cited as the "Federal Gas Safety Code.")

For the reasons explained herein, I conclude that the Department has properly invoked Section 6.151 of Vermont Public Service Board Rule 6.100 as a jurisdictional basis for alleged violations of natural-gas-line safety standards committed by VGS. Therefore, with one exception relating to Count #27 of the NOPV, I deny the Company's summary judgment motion seeking dismissal for want of subject-matter jurisdiction. Similarly, I deny the Company's motion to dismiss numerous counts in the NOPV for failure to state a claim, except I grant such dismissal with regard to seven counts alleging pipe-segment corrosion and two counts alleging failure to protect customer meters and regulators from damage.³ Finally, I invite comment from the Department with respect to VGS's alternative relief request to suspend Board Rule 6.100 in favor of a rulemaking proceeding.

I. Procedural Background

On February 27, 2009, the Department served a NOPV upon VGS, alleging 31 violations of various federal gas safety code standards that are applicable to Vermont gas utilities pursuant to Section 6.150 of Board Rule 6.100 – the rule governing the construction and operation of natural-gas-service transmission and distribution systems within VGS's service territory.⁴ Pursuant to 30 V.S.A. § 2816 and Section 6.104 of Board Rule 6.100, the Department also filed the NOPV with the Vermont Public Service Board ("Board") as a petition seeking an order imposing a civil penalty of \$51,000 and requiring remedial action by VGS.

On March 30, 2009, in accordance with Board Rule 6.104(D), VGS submitted a response to the NOPV that denied all of the alleged violations and sought a declaratory judgment pursuant to 3 V.S.A. § 808 that Board Rule 6.100 does not confer subject-matter jurisdiction relating to the installation, monitoring or maintenance of any customer-owned, above-ground service pipe.⁵ VGS further requested dismissal of substantially all of the counts detailed in the NOPV, asserting

3. The NOPV counts I have ordered dismissed pursuant to Rule 12(b)(6) of the Vermont Rules of Civil Procedure are as follows: Counts 1, 3, 4, 6, 8, 13 and 27, to the extent these are founded on alleged violations of 47 C.F.R. § 192.353, and Counts 22 and 25, to the extent these are founded on alleged violations of 47 C.F.R. § 192.355.

4. Hereinafter cited as "Board Rule ____".

5. *Response of Vermont Gas Systems, Inc. and Request for Relief* dated March 30, 2009, at 26 (hereinafter cited as "VGS NOPV Response at ____"). For ease of reference in this Order, I will cite to the dismissal requests made by VGS in the VGS NOPV Response as "the Rule 12 Dismissal Requests."

(1) lack of subject-matter jurisdiction (V.R.C.P. 12(b)(1) and (h)(3)); and (2) failure to state a claim (V.R.C.P. 12(b)(6)).⁶

On May 7, 2009, VGS submitted a clarifying request asking that the Board treat the Company's motion for a declaratory ruling as a motion for partial summary judgment pursuant to V.R.C.P. 56.⁷

On May 12, 2009, I issued a procedural Order in this matter setting June 8, 2009, as the deadline for the Department to "file a reply to VGS's requests for relief."⁸

On June 10, 2009, the DPS submitted a reply brief opposing VGS's motion for partial summary judgment. In that filing, the Department stated that its reply "addresses the request for partial summary judgment and is limited to the issues noted in the May 7, 2009, VGS filing."⁹ The Department did not respond to any of VGS's Rule 12(b)(6) dismissal requests.

On June 19, 2009, VGS filed a rebuttal to the DPS Reply in which the Company carried forward its request for partial summary judgment and reiterated its motion for dismissal.¹⁰ The Company observed that while the Department had only responded to the partial summary judgment motion, VGS still wished to obtain dispositive rulings on all of its remaining Rule 12 Dismissal Requests.¹¹ Accordingly, VGS requested that a deadline be set for the Department to respond to the Company's remaining Rule 12 Dismissal Requests.

On June 29, 2009, the Department filed a surreply that, *inter alia*, responded to VGS's Rule 12 Dismissal Requests.¹²

6. *Id.*

7. Letter from Kimberly Hayden, Esq., to Susan M. Hudson, Clerk of the Board, dated May 7, 2009.

8. Docket 7513, *Prehearing Conference Memorandum and Schedule* of 05/12/09 at 2. The Department subsequently sought and received an extension until June 10, 2009, for filing the reply due under the docket schedule on June 8, 2009.

9. *Reply of the Department of Public Service to the Request of Vermont Gas Systems, Inc. For Declaratory Relief and/or Dismissal of the Notice of Probable Violations*, dated June 10, 2009, at 1 (hereinafter cited as "DPS Reply at ___").

10. *Vermont Gas Systems, Inc.'s Response to the Vermont Department of Public Service's June 10, 2009, Brief* at 4-5 (hereinafter cited as "VGS Reply at ___").

11. *Id.*

12. *Sur-Reply of the Department of Public Service to the Request of Vermont Gas Systems, Inc. for Declaratory Relief and/or Dismissal of the Notice of Probable Violations*, dated June 29, 2009, at 4 (hereinafter cited as "DPS Surreply at ___"). The Department explained that its previous silence with respect to VGS's Rule 12 Dismissal

(continued...)

II. Discussion and Conclusions

In this opinion, I rule as follows on these eight issues raised by VGS in its motions for partial summary judgment and dismissal:

1. Issue #1: Request for summary judgment and dismissal -
Applicability of Section 6.151 of Board Rule 6.100 to above-ground, customer-owned service pipes
(NOPV Counts 1-8, 12-20, 22, 24-27, 29 & 30)

I deny this request for summary judgment pursuant to V.R.C. P. 56 and dismissal pursuant to V.R.C.P. 12(b)(1) and (h)(3).
2. Issue #2: Request for summary judgment and dismissal -
Grandfathered service pipe installations
(NOPV Counts 6, 8, 26 & 29)

I deny this request for summary judgment pursuant to V.R.C. P. 56 and dismissal pursuant to V.R.C.P. 12(b)(1) and (h)(3).
3. Issue #3: Request for summary judgment and dismissal -
Jurisdictional gas facilities
(NOPV Count 27)

I grant this request for summary judgment pursuant to V.R.C. P. 56 and dismissal pursuant to V.R.C.P. 12(b)(1) and (h)(3).
4. Issue #4: Request for dismissal -
Failure to state a claim under 49 C.F.R. § 192.353
(inapplicable code provision)
(Counts 1-8, 12-20, 24, 26, 27, 29 and 30)

12. (...continued)
Requests was due to a miscommunication between counsel.

I grant in part and deny in part this request for dismissal pursuant to V.R.C.P. 12(b)(6).

5. Issue #5: Request for dismissal -
Failure to state a claim under 49 C.F.R. § 192.355
(protection of customer meters and regulators from damage)
(Counts 22 and 25)

I grant this request for dismissal pursuant to V.R.C.P. 12(b)(6).

6. Issue #6: Request for dismissal -
Failure to state a claim under 49 C.F.R. § 192.481
(monitoring atmospheric corrosion)
(Counts 10, 21 and 28)

I deny this request for dismissal pursuant to V.R.C.P. 12(b)(6).

7. Issue #7: Request for dismissal -
Failure to state a claim under 49 C.F.R. § 192.613
(continuing surveillance)
(Counts 5, 9-11, 21-25, 28, 29 and 31)

I deny this request for dismissal pursuant to V.R.C.P. 12(b)(6).

8. Issue #8: Request for dismissal -
Failure to state a claim under 49 C.F.R. § 192.353(a)
(location of customer meters and regulators)
(Counts 9, 21, 23, 24, 28 and 29)

I deny this request for dismissal pursuant to V.R.C.P. 12(b)(6).

A. VGS's Motion for Partial Summary Judgment

I turn first to VGS's request for partial summary judgment on Issues 1-3 as enumerated above.

Standard for Summary Judgment

Pursuant to Board Rule 2.219, V.R.C.P. 56 applies to Board proceedings. V.R.C.P. 56 provides that a defending party such as VGS may "at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part" of the claims that have been brought against that party. The purpose of the summary judgment procedure "is solely to determine whether a genuine issue of fact exists."¹³ Where a genuine issue of material fact exists, "summary judgment may not serve as a substitute for a determination on the merits."¹⁴

Summary judgment "is appropriate when, taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law."¹⁵ Under Rule 56 the moving party "has the burden of proof, and the opposing party is 'given the benefit of all reasonable doubts and inferences in determining whether a genuine issue [of material fact] exists.'"¹⁶

In keeping with the requirements of V.R.C.P. 56(c)(2), VGS attached to its summary judgment motion "a separate, short and concise statement of the material facts" as to which VGS contends there is no genuine issue to be tried. That rule further provides that all material facts set forth in that statement are deemed to be admitted unless controverted by the opposing party.¹⁷

Undisputed Facts

Having reviewed VGS's Statement of Undisputed Facts and the Department's Response to the Statement of Undisputed Facts of Vermont Gas Systems, Inc.,¹⁸ I conclude that the following facts are not in dispute:

13. *Fonda v. Fay*, 131 Vt. 421, 422 (1973) (per curiam).

14. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶10, 179 Vt. 545, 547 (2005).

15. *Noble v. Kalanges*, 2005 VT 101, ¶16, 179 Vt. 1, 3 (2005).

16. *Travelers Ins. Cos. v. Demarle, Inc., USA*, 2005 VT 53, ¶3, 178 Vt. 570, 571(2005) (citing *Messier v. Metro. Life Ins. Co.*, 154 Vt. 406, 409 (1990) (parenthetical in the original)).

17. V.R.C.P. 56(c)(2).

18. These documents hereinafter are respectively cited as "VGS Facts at ___" and "DPS Facts at ___."

1. Twenty-four of the alleged violations cited in the NOPV concern above-ground service pipe. VGS Facts at 1 ¶ A-2; DPS Facts at 1 ¶ A-2.
2. Twenty-two of the alleged violations cited in the NOPV concern service pipe located downstream of the outlet side of the customer meter. VGS Facts at 1 ¶ 3; DPS Facts at 1 ¶ A-1 and ¶ A-3.
3. Twenty-two of the alleged violations cited in the NOPV concern the alleged failure to protect pipe segment from atmospheric corrosion (rust). VGS Facts at 1 ¶ A-4; DPS Facts at 1 ¶ A-4.
4. Two of the alleged violations cited in the NOPV concern the alleged failure to seal wall-openings to prevent gas leakage into the building. VGS Facts at 1 ¶ A-5; DPS Facts at 1 ¶ A-5.
5. One of the alleged violations cited in the NOPV concerns a pipe that is not a natural-gas service pipe. VGS Facts at 2 ¶ C-1; DPS Facts at 2 ¶ C-1.

Unrebutted Facts

When a summary judgment motion is made and supported in compliance with the requirements of V.R.C.P. 56, "the adverse party may not rest upon the mere allegations or denials of the adverse party's pleading" ¹⁹ Thus, to rebut VGS's assertion of an undisputed material fact, V.R.C.P. 56(e) requires the Department to "set forth specific facts showing that there is a genuine issue for trial."

VGS's Statement of Undisputed Facts was supported by an affidavit from Timothy Lyons, VGS's Vice President of Sales and Marketing. Under such circumstances, V.R.C.P. 56 imposes upon the Department the heightened burden of rebuttal by providing credible documentation or affidavits to controvert VGS's Statement of Undisputed Facts.²⁰ The Department's rebuttal documentation consisted of an unsworn statement by counsel who is neither an affiant with personal knowledge nor a witness competent to testify as to the matters stated in the

19. V.R.C.P. 56(e). *See also Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356, 363 (2004) ("the opponent to a summary judgment motion cannot simply rely on mere allegations in the pleadings to rebut credible documentary evidence or affidavits, but must respond with specific facts that would justify submitting [the] claims to a fact finder" (citations omitted)).

20. V.R.C.P. 56(e).

Department's response. In five instances, the Department's response states that it "has insufficient knowledge to admit or deny" the particular fact that VGS claims is not in dispute.²¹ I therefore conclude that the Department has failed to satisfy the standard set forth in Rule 56(e) for controverting the remaining four facts which VGS contends are not in dispute. Accordingly, I deem these following facts to be unrebutted, and therefore admitted pursuant to V.R.C.P.

56(c)(2):

1. Twenty-four of the allegations cited in the NOPV pertain to maintenance of customer-owned service pipe. VGS Facts at 1 ¶ A-1.
2. VGS does not own the service pipes located downstream of the outlet-side of the customer meter. VGS Facts at 1 ¶ A-6.
3. Customers own the service pipes located downstream of the outlet-side of the customer meter. VGS Facts at 2 ¶ A-7.
4. Four of the allegations cited in the NOPV pertain to service pipes that were installed prior to 1999. VGS Facts at 2 ¶ B-1.

Issue #1:

Request for summary judgment -

Applicability of Section 6.151 of Board Rule 6.100

to above-ground, customer-owned service pipes

(NOPV Counts 1-8, 12-20, 22, 24-27, 29 & 30)

At issue in VGS's first summary judgment request is whether, as a matter of law, the Company is responsible for the installation or maintenance of natural-gas service-line segments beyond the outlet of a customer's meter or at the connection to a customer's pipe, whichever is further downstream. The Department maintains that the Board's gas-line safety regulations impose such responsibilities upon VGS, regardless of who owns the pipe at issue, and regardless of whether such pipes run above-ground or are buried.²² The Company disagrees, arguing that the Board's rule does not assert subject-matter jurisdiction over pipe segments that are customer-

21. Department Facts at 1 ¶¶ A-1, A-3, A-6, A-7 and at 2 ¶ B-1. The Department's phrasing suggests that it was responding to VGS's Statement of Undisputed Facts in the manner prescribed by V.R.C.P. 8(b), which sets the standards for raising defenses and denying averments in affirmative pleadings, but which does not pertain to Rule 56 summary judgment motions.

22. Department Reply at 2, 4 and 6.

owned and run above-ground.²³ Therefore, because the majority of the alleged violations in the NOPV deal with segments of customer-owned, above-ground service pipe beyond the outlet side of the customer meter, it is necessary to examine the combined operation of several sub-parts of Board Rule 6.100, which governs the construction and operation of gas transmission and distribution systems in Vermont.

As the jurisdictional basis for 22 of the counts in the NOPV, the Department specifically cited Section 6.151 of Board Rule 6.100, which provides as follows:

6.151 Purpose and Scope

These Rules cover the design, construction, installation, operation, maintenance, testing, inspection, and safety features of gas transmission and distribution systems, including gas storage, metering and regulating stations, mains and services *up to the outlet of the customer's meter assembly, or outside the building wall, whichever is further downstream.*

These Rules and Regulations shall be complied with in all new installations but shall not apply retroactively to existing facilities except where specifically indicated or if the Public Service Board determines that existing equipment or operations are hazardous to the public.

These Rules and Regulations shall apply to every person, firm, company, corporation and municipality engaged in the construction or operation of any gas transmission or distribution system in the State of Vermont which is or shall become subject to the jurisdiction of this Board.²⁴

The Department's basis for 22 of the alleged violations is that VGS has failed to properly maintain portions of service lines "up to the outlet of the customer's meter assembly, or outside the building wall, whichever is further downstream."²⁵

In response, VGS counters that the Department's enforcement theory "rests upon the incorrect premise that Board Rule 6.151 expands federal code requirements to the customer-owned, above-ground service pipe."²⁶ The Company contends that Board Rule 6.100 must be read to be congruent with the requirements of the Federal Gas Safety Code and nothing more. Thus, VGS argues, it is not subject to any maintenance obligations extending beyond those

23. VGS NOPV Reply at 7.

24. Board Rule 6.151 (emphasis added).

25. *Notice of Probable Violation* dated February 27, 2009, at p. 2-4 (hereinafter cited as "NOPV at ____").

26. VGS NOPV Reply at 3. VGS's citation to "federal code requirements" is a reference to the Federal Gas Safety Code.

imposed by the applicable Federal Gas Safety Code standards, which do not require VGS to maintain pipe segments beyond the outlet of the customer meter or at the connection to the customer's pipe, whichever is further downstream.²⁷ VGS also points out that Board Rule 6.100 itself contains no language articulating any substantive standards for constructing and maintaining customer-owned, above-ground pipe segments – a fact that the Company takes as further proof that the Board's rule is not intended to assert jurisdiction over such pipe segments or to otherwise deviate from the Federal Gas Safety Code requirements.²⁸

Customer-Owned Pipe

I do not find VGS's jurisdictional arguments persuasive. Turning first to the issue of whether VGS's regulatory responsibilities in Vermont are determined by whether a pipe segment is "customer-owned," I do not perceive any basis for construing Section 6.151 as delimiting the Board's jurisdiction or a gas company's regulatory responsibilities on the basis of legal ownership of the pipe in question. Rather, in asserting this argument, the Company overlooks the Board's express and comprehensive assertion of subject-matter jurisdiction in Section 6.151 over *all* piping in Vermont. Section 6.151 states that the Board's gas safety rules apply to every gas company subject to the jurisdiction of the Board and that these rules "cover the design, construction, installation, operation, maintenance, testing, inspection, and safety features of *gas transmission and distributions systems, including gas storage, metering and regulating stations, mains and services up to the outlet of the customer's meter assembly, or outside the building wall, whichever is further downstream.*"²⁹ The words "gas transmission and distribution systems, including . . . mains and services . . . " in Section 6.151 are plain and unambiguous. This language encompasses *all* pipe that is part of a gas transmission or a gas distribution system, to include, in particular, main pipes and service pipes.

The phrase "outside the building wall" is also unambiguous and describes a point beyond the customer's meter assembly, therefore intentionally extending a gas company's regulatory obligations in Vermont downstream to the point after which pipe segments are owned by

27. VGS NOPV Reply at 7.

28. *Id.* at 8.

29. Board Rule 6.155 (emphasis added).

customers. In this regard, the language of Section 6.151 indeed differs from the Federal Gas Safety Code, which states that a gas company's responsibilities cease at the gas company's point of connection to a customer's piping, or at the point when the gas may be deemed to have been delivered to the customer.³⁰ Nonetheless, it is the language of Section 6.151 that is controlling when determining VGS's regulatory pipeline safety obligations in Vermont, and not the language in the Federal Gas Safety Code.³¹

Nor do I agree with VGS that the scope of the Board's unambiguous assertion of jurisdiction is either undermined or voided by the Federal Gas Safety Code's "service line" definition that the Company cites for the proposition that its construction and maintenance responsibilities do not extend beyond the outlet of the customer meter.³² To the extent that the jurisdictional scope of Board Rule 6.151 may be deemed to conflict with the Federal Gas Safety Code's "service line" definition in delineating the extent of the service pipe VGS is responsible for constructing and maintaining in Vermont, Board Rule 6.154 provides a clear decisional principle for resolving any such conflict:

6.154 Compliance With Federal Regulations

Every gas transmission or distribution system shall be constructed, tested, and operated, except as otherwise provided in these Rules, in compliance with the provisions of the presently effective Federal Regulations and any future revisions of that code. *When the regulations stated in these Rules are more stringent than the Federal Regulations, provisions in these Rules shall apply; if the provisions as stated in these Rules are less stringent than the Federal Regulations, the Federal Regulations shall take precedence.*³³

The express terms of Section 6.154 leave no doubt that, when Board Rule 6.100 in substance conflicts in any way with the Federal Gas Safety Code, the more stringent requirement shall prevail. The very fact that this provision for resolving conflicts was included in Board Rule 6.100 is a clear indication that the Board anticipated the possibility of such conflicts and the attendant need to resolve them. This negates the inference advanced by VGS that the Board

30. 49 C.F.R. § 192.3 and 1994 OPS Interpretive Letter.

31. See Board Rule 6.154, which is discussed below.

32. VGS NOPV Reply at 6-7 (citing 49 C.F.R. § 192.3).

33. Board Rule 6.154 (emphasis added).

intended to do nothing more in adopting Board Rule 6.100 than to confine the assertion and exercise of its regulatory jurisdiction to the letter of the Federal Gas Safety Code requirements. I therefore reject VGS's contention that the scope of the subject-matter jurisdiction asserted by the Board in Board Rule 6.100 is limited by the Federal Gas Safety Code's definition of the term "service line."³⁴

Thus, I conclude there is nothing in Section 6.151 to suggest that the legal title of ownership of the pipes in any way controls the scope of the subject matter jurisdiction asserted by the Board in promulgating Board Rule 6.100. I therefore reject VGS's argument that "customer-owned" segments of service pipe do not fall within Board Rule 6.100's subject-matter jurisdiction.

Above-Ground Pipe

Equally unconvincing is VGS's argument that Board Rule 6.100 does not reach *above-ground* service piping. In support of this alleged jurisdictional limitation, VGS cites to Section 6.155, which pertains to "Service Piping" and provides as follows:

6.155 Service Piping

Gas service piping up to the entry of the first building downstream of that customer, or, *if the buried pipe does not enter a building*, up to the principle gas utilization equipment or the first fence (or wall) that surrounds that equipment, shall be installed and maintained pursuant to these Rules and the Federal Regulations. However, for a customer-owned service line, as defined in the Federal Regulations, for an industrial application, responsibility for compliance with these Rules and the Federal Regulation resides with the industrial customer.

For a customer-owned service line, as defined in the Federal Regulation, the Gas Corporation may assess the reasonable cost of complying with this section to the customer owning or using such customer-owned service line. Such assessment must be reviewed and approved by the Board pursuant to a tariff filing under 30 V.S.A. §§ 218, 225, 226, and 227.³⁵

34. VGS also points to its existing tariff on file with the Board for support in arguing that on-going maintenance of customer-owned pipe is the responsibility of the customer. VGS NOPV Reply at 8. To the extent VGS's existing tariff conflicts with my construction of Board Rule 6.100, it follows that VGS's tariff must be amended to comply with Board Rule 6.100, instead of being used to justify a departure from the requirements of that rule.

35. Board Rule 6.155 (emphasis added).

The Company points to the first subordinate clause in the first sentence of the rule, "if the buried pipe does not enter a building," as limiting the jurisdictional reach of Section 6.155. According to VGS, this specific reference to buried pipe "creates an inference that it was not intended to apply to above-ground gas service piping."³⁶ Therefore, VGS argues, Section 6.155 imposes duties only with regard to "buried pipe," and not to above-ground segments of pipe.³⁷ The Department counters that VGS has drawn an illogical inference from the clause in which the word "buried" appears, and that the only logical reading of Section 6.155 is that the Board intended to require gas system operators to be responsible for compliance with gas safety on all customer-owned service lines, with the exception of lines owned by industrial customers.³⁸

I agree with the Department that VGS is reading more into the "buried pipe" reference in Section 6.155 than is warranted. Common sense holds that natural gas service lines run either above ground or below ground, and that there is nothing in between. The first sentence of Section 6.155 is phrased in broad terms, referring to "service piping" in general, which "shall be installed and maintained" pursuant to the Board's rules and federal regulations. It follows, then, that the subordinate clause referring to "buried pipe" is logically read as simply supplying additional guidance to gas-system operators about their responsibilities, depending on whether they are dealing with service piping that runs above ground or is buried below ground.

36. VGS NOPV Reply at 7.

37. Because I do not find Section 6.155 to be ambiguous in regard to the issues raised in the arguments presented by VGS and the Department, there is no need to address the statutory construction arguments presented by the parties.

38. DPS Reply at 7. To the extent that Board Rule 6.100 in any way differentiates regulatory responsibilities on the basis of legal ownership of a pipe segment, the resulting conclusion cuts against VGS's position. Section 6.155 specifically imposes the responsibility for complying with the Board's gas safety rules and the Federal Gas Safety Code upon "industrial customers" who own natural gas service lines in Vermont "for an industrial application." The logical implications of the Board's decision to single out "industrial customers" for this exceptional regulatory treatment are (1) that the remaining base of VGS's customers – residential and non-commercial ratepayers – do not bear the responsibility for complying with the Board's gas safety rules and the Federal Gas Safety Code; and (2) that this responsibility rests with the gas company, which is authorized by Board rule to "assess the reasonable cost of complying with [Section 6.155 obligations] to the customer owning or using such customer-owned service line." Board Rule 6.155.

Applicability of Federal Gas Safety Code Standards

Finally, I am not swayed by VGS's argument that summary dismissal is warranted because the Department has improperly borrowed the substantive standards of the Federal Gas Safety Code while simultaneously rejecting the Federal Gas Safety Code's exclusion of customer-owned, above-ground pipe from the scope of that code's applicability.³⁹ In all 22 of the counts in the NOPV concerning customer-owned, above-ground pipe, the Department has applied the substantive performance standards for gas line installation and maintenance that are set forth in Title 49 of the Code of Federal Regulations.⁴⁰ According to the Department, it is appropriate to look to these standards in judging VGS's conduct because the Board has expressly incorporated these federal standards into Board Rule 6.100 by reference through Section 6.154 of that rule. According to VGS, the plain meaning of Sections 6.151 and 6.154 are "not clear" and "certainly do not convey a clear expression of the Board's intent to adopt an entirely new layer of gas safety regulations above and beyond the federal safety regulations" ⁴¹

VGS's attempt to avoid the force of Section 6.154 by asserting the existence of pervasive ambiguity in Board Rule 6.100 is unpersuasive. Section 6.154 includes the following language that specifically incorporates the federal standards: "Every gas transmission or distribution system shall be constructed, tested, and operated, except as otherwise provided in these Rules, in compliance with the provisions of the presently effective Federal Regulations and any future revisions."⁴² The Company argues that because the "Federal Regulations" themselves do not contain any construction or maintenance obligations for customer-owned, above-ground service piping, it necessarily follows that the Board has no substantive standards for adjudicating the Department's charges dealing with customer-owned, above-ground service piping.⁴³

39. VGS NOPV Reply at 8.

40. See NOPV at 2-4. See also 49 C.F.R. Parts 190-199. The section of the Federal Gas Safety Code that is pertinent to the NOPV is Part 192, which, *inter alia*, establishes minimum standards for guarding against atmospheric corrosion, piping stress, inadequate monitoring and installation practices, and the risk of vehicular damage to service line facilities.

41. VGS Reply at 9.

42. Board Rule 6.154. Significantly, Section 6.154 bears the title: "Compliance With Federal Regulations."

43. VGS NOPV Reply at 7-9.

As the Department correctly points out, VGS is confusing the scope of jurisdiction — what facilities are covered by the Federal Gas Safety Code — with the standards for exercising that jurisdiction — the requirements that the Federal Regulations impose with respect to those facilities.⁴⁴ Using its rulemaking authority, the Board has promulgated Board Rule 6.100 and thus has determined and expressed the scope of its subject-matter jurisdiction over service pipes in Vermont, to include customer-owned, above-ground pipe, which is an intentional departure from the scope of the Federal Gas Safety Code. The Board's references in Board Rule 6.100 to the Federal Regulations must be read and understood in the plain context of the subject-matter jurisdiction lawfully asserted by the Board in Section 6.151.⁴⁵ Thus, by incorporating the Federal Gas Safety Code's standards by reference into 6.100, the Board has unambiguously adopted those standards for judging gas company conduct that falls within the scope of the Board's jurisdiction for review and sanction, if and when warranted.

Having thus read and construed Sections 6.151, 6.154 and 6.155 of Board Rule 6.100 in unison, I reach the following two conclusions:

(1) The Department has properly invoked Board Rule 6.151 as the basis for the Board's subject-matter jurisdiction in this enforcement proceeding, and therefore all charges related to customer-owned, above-ground service pipe segments are properly before this Board for adjudication; and

(2) Board Rule 6.100 by reference incorporates the substantive standards of the Federal Gas Safety Code, and therefore these standards apply in determining whether there is any merit to the Department's claims as detailed in the NOPV.

Accordingly, I deny VGS's first request for summary judgment due to lack of subject-matter jurisdiction.

44. DPS Reply at 4.

45. The relevant references in Board Rule 6.100 to the Federal Regulations are found in Sections 6.152, 6.154 and 6.155.

Issue #2:
Request for summary judgment -
Grandfathered service pipe installations
(NOPV Counts 6, 8, 26 & 29)

Section 6.151 of Board Rule 6.100 contains a grandfathering provision that exempts natural gas facilities installed prior to the effective date of that rule. Section 6.151 provides in pertinent part:

These Rules and Regulations shall be complied with in all new installations but shall not apply retroactively to existing facilities except where specifically indicated or if the Public Service Board determines that existing equipment or operations are hazardous to the public.

Four of the alleged violations cited in the NOPV deal with service pipe that was installed prior to December 10, 1999 — the effective date of Board Rule 6.100.⁴⁶ As determined above, VGS has successfully established that there is no genuine issue to be tried with respect to this material fact.⁴⁷

After VGS moved for summary judgment on these counts, the Department filed an amendment to the NOPV alleging further that these four counts "involved equipment or operations that were hazardous to the public."⁴⁸

VGS argues that dismissal of the "amended" four counts is appropriate because the Department's late amendment to the NOPV fails to comply with Section 6.104(B)(2), which sets forth the pleading requirements for properly serving an NOPV under Board Rule 6.100, and Section 6.105, which provides for an expedited hearing process if the Department determines "that a gas facility presents an immediate hazard to life, health, property, or continued utility service" The Department, in turn, responds that VGS's objections are without merit, first because the Department is not seeking expedited relief pursuant to Section 6.105, and second because the issue of whether any of the four amended counts involved a condition hazardous to

46. See Board Rule 6.100.

47. See, *infra*, p. 7.

48. DPS Surreply at 3 and attached Exhibit 1.

the public is a factual question that will require discovery and therefore is not appropriate for summary-judgment resolution.⁴⁹

On its face, it is evident that the Department's amendment to the NOPV does not seek expedited relief pursuant to Section 6.105. Accordingly, the failure to abide by the pleading requirements of Section 6.105 does not provide a basis for dismissing the four amended counts at this time.

Nor do I conclude that it would be appropriate to dismiss the four amended counts for failure to satisfy the pleading requirements of Section 6.104(B)(2). Given the importance of preserving public confidence in the integrity and safety of Vermont's natural gas service infrastructure, it is troubling that the Department's amendment to the NOPV has raised allegations of a public hazard without an express statement in narrative form of the evidence to support the allegation of "equipment or operations that were hazardous to the public."⁵⁰ However, because VGS is seeking summary-judgment dismissal of the four amended counts, I must give the Department the benefit of all reasonable doubts and inferences in determining whether summary judgment is appropriate. The Department attached to the original NOPV five pages of photographs depicting 31 alleged violations of the construction or maintenance standards applicable to VGS pursuant to Board Rule 6.100. Four of these photographs are labeled with identification numbers that correlate to NOPV Counts 6, 8, 26 and 29. The amended NOPV now charges that all 31 counts constitute public hazards. It is reasonable to infer that the Department intended for the photographs attached to the NOPV to take the place of an express statement of the evidence supporting its allegation of the existence of "equipment or operations hazardous to the public."

VGS has forcefully responded that it has "investigated all of the locations cited in the NOPV, and none presents a hazard or a safety risk," and that the Company "is prepared to introduce an expert in gas pipeline safety that will prove this."⁵¹ Accordingly, I conclude that there exists a genuine issue of fact concerning whether the four counts involving facilities

49. *Id.* at 3.

50. Board Rule 6.104(B)(2).

51. VGS Reply at 7.

constructed before December 10, 1999, constitute public hazards and therefore provide a basis for imposing sanctions upon VGS for violating Board Rule 6.100. Therefore, recognizing that "summary judgment may not serve as a substitute for a determination on the merits," I deny VGS's motion for summary judgment dismissal of Counts 6, 8, 26 and 29 of the NOPV.

Issue #3:

Request for summary judgment

Jurisdictional gas facilities

(NOPV Count 27)

One of the alleged violations cited in the NOPV concerns pipe that is not used for natural-gas service. This fact is not in dispute. Furthermore, this undisputed fact is material because the jurisdictional reach of Board Rule 6.100 only attaches to piping that is used in "gas transmission and distribution systems." Therefore, because the Department has charged VGS with a violation of Board Rule 6.100 pertaining to a non-jurisdictional pipe, I grant VGS's motion for summary-judgment dismissal of Count 27 in the NOPV.

B. VGS's Motion To Dismiss Pursuant to V.R.C.P 12(b)(6)

I turn next to VGS's requests for dismissal identified as Issues 4 through 8, above.

A motion to dismiss challenges the sufficiency of another party's averments contained in its pleading – in this case, the Department's NOPV. The purpose of a "motion to dismiss for failure to state a claim, is to test the law of a claim, not the facts which support it."⁵² A motion to dismiss does not consider the sufficiency of the proof, but only the sufficiency of the allegations in the petition. As the Supreme Court has stated: "[d]ismissal for insufficiency of proof can come only after the petitioner has had the opportunity to present his supporting evidence."⁵³

The standard for review of a motion to dismiss is well established. The Vermont Supreme Court has consistently held that:

52. *Levinsky v. Diamond*, 140 Vt. 595, 600 (1982) (internal quotations omitted), overruled on other grounds, *Muzzy v. State*, 155 Vt. 279, 280 (1990)).

53. *In re: Green Mountain Power Corp. Rate Filing*, 139 Vt. 368, 373 (1981).

A motion to dismiss a cause of action for failure to state a claim upon which relief may be granted should be denied "unless it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief."⁵⁴

Moreover, in reviewing the disposition of a V.R.C.P. 12(b)(6) motion to dismiss, the Board:

assumes that all factual allegations pleaded in the complaint are true . . . accept[s] as true all reasonable inferences that may be derived from plaintiff's pleadings and assume [s] that all contravening assertions in defendant's pleadings are false.⁵⁵

On this basis, none of the counts listed in the NOPV could be dismissed unless it appears from the allegations contained in the NOPV that the Department could prove no set of supporting facts to justify granting the relief requested in the NOPV.⁵⁶ With these principles in mind, I turn to the first of the Company's four requests for dismissal pursuant to V.R.C.P. 12(b)(6).

Issue #4:

Request for dismissal -

Failure to state a claim under 49 C.F.R. § 192.353 (inapplicable code provision)

(Counts 1-8, 12-20, 24, 26, 27, 29 and 30)

VGS maintains that, in 22 instances, the Department has failed to state a claim under 49 C.F.R. § 192.353 because each of these alleged 22 violations cites a standard pertaining to "customer meters" and "regulators" while describing each of those 22 violations as a failure to protect a "pipe segment" from atmospheric corrosion.⁵⁷ The Department responds that VGS is raising an "irrelevant" question of fact and contends that the term "pipe segment" could include a "meter" or "regulator."⁵⁸ The Department also argues that dismissal of these charges at this stage

54. *Union Mut. Fire Ins. Co. v. Joerg*, 2003 VT 27, ¶ 4, 175 Vt. 196, 198 (2003) (citing *Amiot v. Ames*, 166 Vt. 288, 291, 693 A.2d 675, 677 (1997)).

55. *Union Mut. Fire Ins. Co. v. Joerg*, 2003 VT 27, ¶ 4, 175 Vt. 196, 198 (2003); *Wharton v. Tri-State Drilling & Boring*, 824 A.2d 531, 535 (2003) (citing *Richards v. Town of Norwich*, 169 Vt. 44, 48-49 (1999)).

56. *Assoc. of Haystack Property Owners v. Sprague*, 145 Vt. 443, 446 (1985).

57. VGS NOPV Reply at 12.

58. DPS Surreply at 4-5. The Department further asserts that VGS's pleading objection raises an "irrelevant" question of fact because the Department has also pleaded an alternative basis for these 22 "pipe segment" charges – 49 C.F.R. § 192.479, which deals with atmospheric corrosion control for pipelines.

would be inappropriate because the issue of "whether a pipe segment could include a meter or regulator is . . . a question of fact, which requires evidentiary resolution . . ." ⁵⁹

In arguing that the Department has mistakenly cited 49 C.F.R. § 192.353 for 22 of the counts in the NOPV, VGS is challenging the sufficiency of the allegations in the NOPV supporting those charges on that legal basis.⁶⁰ The Company's argument is that the NOPV's bare allegations of "violation description" and "pipe segment not protected from atmospheric corrosion," if proven, cannot support the requested relief of a penalty because a "pipe segment" is not interchangeable with a customer meter or regulator. Contrary to the Department's suggestion, this is not an irrelevant question of semantics. This issue goes to whether the Department's NOPV has met the rudimentary pleading requirements of V.R.C.P. 8(a) and thus can survive a 12(b)(6) dismissal motion for failure to state a claim. The Department argues that "evidentiary resolution" is appropriate for a question of fact.⁶¹ But this argument overlooks the requirement that a claim first must be sufficiently pleaded in order to go forward for "evidentiary resolution."

The applicable definition section of Part 49 of the Code of Federal Regulations specifically identifies "customer meter," "service regulator" and "pipe" as terms distinct from each other.⁶² Furthermore, on its face, 49 C.F.R. § 192.353 applies only to meters and regulators. That substantive standard of the Federal Gas Safety Code makes no mention of pipe segments:

§ 192.353 Customer meters and regulators: Location.

(a) Each meter and service regulator, whether inside or outside a building, must be installed in a readily accessible location and be protected from corrosion and other damage, including, if installed outside a building, vehicular damage that may be anticipated. However, the upstream regulator in a series may be buried.

(b) Each service regulator installed within a building must be located as near as practical to the point of service line entrance.

59. *Id.*

60. The NOPV is not structured in the manner of a traditional complaint or a petition for an order to show cause. There are, for instance, no enumerated paragraphs setting forth the Department's allegations in a narrative order that shows how the allegations support each count. Instead, the NOPV relies almost entirely upon a combination of a spreadsheet and photographs in order to plead the Department's allegations.

61. DPS Surreply at 4.

62. 49 C.F.R. § 192.3.

(c) Each meter installed within a building must be located in a ventilated place and not less than 3 feet (914 millimeters) from any source of ignition or any source of heat which might damage the meter.

(d) Where feasible, the upstream regulator in a series must be located outside the building, unless it is located in a separate metering or regulating building.⁶³

In order to successfully state a claim pursuant to 49 C.F.R. § 192.353, the Department must plead sufficient allegations showing that the elements of a claim under 49 C.F.R. § 192.353 will be met, assuming those allegations are ultimately proven to be true. Because 49 C.F.R. § 192.353 only applies to meters and regulators, for purposes of properly pleading a violation of that section, the Department errs as a matter of law in asserting that "evidentiary resolution" is required to resolve whether a pipe segment could also include a meter or a regulator.

When considering a motion to dismiss for failure to state a claim, I must examine the bare allegations in the pleading and determine whether they state a claim for relief, assuming legally sufficient evidence is adduced in due course to support that claim.⁶⁴ In the context of ruling on a Rule 12(b)(6) motion, the Department is entitled to the benefit of every reasonable doubt when reviewing the legal sufficiency of the allegations in the NOPV. However, this rule is not a license to dispense altogether with the notice pleading requirements of V.R.C.P. 8(a), pursuant to which VGS is entitled to "a short plain statement of the claim showing that the pleader is entitled to relief."

Moreover, VGS's need for a plain statement showing the Department is entitled to the relief requested in the NOPV is heightened in this enforcement proceeding, given that the NOPV seeks a separate fine for each of the 31 alleged violations, and given further that the statutory authority for imposing such fines specifies a potential liability of up to \$100,000 for each day of each violation of "any statute, rule, regulation" or public service board order relating to "applicable" safety standards or safety practices.⁶⁵

63. 49 C.F.R. § 192.353.

64. *Levinsky*, 140 Vt. at 600.

65. See NOPV at 2-4 (data spreadsheet reflecting separate fines for each count). The Board's authority to impose penalties pursuant to this enforcement action stems from the following section of Title 30:

Having examined the data spreadsheet information in the NOPV and the photographs correlating to the 22 NOPV counts at issue in this request for dismissal, I observe that in seven instances, the Department has alleged a violation of 49 C.F.R. § 192.353 that is described only as "[p]ipe segment not protected from atmospheric corrosion" and that correlates to a photograph depicting only a pipe – no customer meter, no regulator.⁶⁶ I therefore conclude that these seven counts are devoid of even the barest allegations required to state a claim pursuant to 49 C.F.R. § 192.353, which concerns meters and regulators, not pipes. Therefore, I grant VGS's motion to dismiss these seven counts to the extent that they are founded on alleged violations of 49 C.F.R. § 192.353.⁶⁷

The remaining 15 counts at issue in this dismissal request also concern alleged violations of 49 C.F.R. § 192.353 that are described only as "[p]ipe segment not protected from atmospheric corrosion," but the correlating photographs show both pipes and meter equipment.⁶⁸ Those photographs bear yellow arrows directed at pipe segments, and not at the meter equipment. Nonetheless, giving the Department the benefit of all reasonable inferences, it is possible that these photographs were intended to depict – and therefore to allege – a violation of 49 C.F.R. § 192.353 due to a non-compliant meter condition. Thus, for these counts, I conclude that the Department has pleaded sufficient allegations to state a claim under 49 C.F.R. § 192.353. I therefore deny VGS's motion to dismiss these 15 counts for failure to state a claim under 49 C.F.R. § 192.353.

65. (...continued)

§ 2816. Civil penalty for violation of gas safety standards

(a) Gas Pipeline Safety Program. Any person who violates any statute, rule, regulation, or order of the public service board relating to safety standards or safety practices applicable to transportation of gas through gas pipeline facilities subject to the jurisdiction of the public service board is subject to a civil penalty of not more than \$100,000.00 for each violation for each day that the violation persists. However, the maximum civil penalty shall not exceed \$1,000,000.00 for any related series of violations. The penalty may be imposed by the board after notice to the offending person of the alleged violations and opportunity for hearing.

66. The seven counts are NOPV Counts 1, 3, 4, 6, 8, 13 and 27.

67. I note that I have not dismissed these seven counts to the extent they are founded on alleged violations of 49 C.F.R. § 192.479 (protecting pipe from atmospheric corrosion).

68. The 15 counts are NOPV Counts 2, 5, 7, 12, 14, 15, 16, 17, 18, 19, 20, 24, 26, 29 and 30.

Issue #5:**Request for dismissal -****Failure to state a claim under 49 C.F.R. § 192.355****(protection of customer meters and regulators from damage)****(Counts 22 and 25)**

VGS maintains that Counts 22 and 25 of the NOPV fail to state a claim pursuant to 49 C.F.R. § 192.355, which pertains to protecting customer meters and service regulators from damage. The Company argues that the allegations dealing with Counts 22 and 25 do not refer to protecting a customer meter or a service regulator from damage. The Department counters that 49 C.F.R. § 192.355 deals with more than just customer meters and service regulators because that standard also contains language referring to the location and installation of service regulator vents and relief vents.⁶⁹

Having examined the data spreadsheet information in the NOPV and the photographs correlating to Counts 22 and 25, I observe that in both cases, the Department has alleged a violation of 49 C.F.R. § 192.355 that is described as a "[w]all opening not sealed to prevent gas leakage into the building." Furthermore, the two photographs identified with Counts 22 and 25 each show a service pipe line entering a building. Neither picture shows a customer meter, a service regulator, a service regulator vent or a relief vent. I therefore conclude that, even assuming the truth of the allegations proffered in support of these two counts, neither count is supported by sufficient allegations to state a claim for relief pursuant to 49 C.F.R. § 192.355. Accordingly, I grant VGS's motion to dismiss Counts 22 and 25 to the extent that they are founded on alleged violations of 49 C.F.R. § 192.355.⁷⁰

Issue #6:**Request for dismissal -****Failure to state a claim under 49 C.F.R. § 192.481 (monitoring atmospheric corrosion)****(Counts 10, 21 and 28)**

VGS maintains that Counts 10, 21 and 28 of the NOPV fail to state a claim pursuant to 49 C.F.R. § 192.481, which pertains to monitoring gas pipeline for purposes of atmospheric

69. DPS Surreply at 5.

70. I note I have not dismissed these two counts to the extent they are founded on alleged violations of 49 C.F.R. § 192.613 (requiring continuing surveillance).

corrosion control. VGS argues that it has a program for monitoring and inspecting for corrosion on a three-year cycle and that there is no apparent detrimental corrosion at the soil-to-air interface locations depicted in the three photographs correlating to Counts 10, 21 and 28. The Company thus argues that its monitoring practices comply with the requirements of 49 C.F.R. § 192.481. The Department disagrees, arguing that this dispute poses a factual question that cannot be adjudicated "until factual development of the record through discovery has occurred."⁷¹

Having examined the NOPV and its attachments, I observe that Counts 10, 21 and 28 are supported by photographs that depict alleged conditions of corrosion at soil-to-air interface locations on VGS's pipeline system, as well as allegations that (1) VGS has undertaken "inadequate monitoring of soil to air interface" at the locations identified with Counts 10, 21 and 28;⁷² (2) the Department has briefed VGS on its understanding of VGS's monitoring obligations under 49 C.F.R. § 192.481;⁷³ (3) VGS has failed to effectively implement procedures that support its obligations under 49 C.F.R. § 192.481;⁷⁴ and (4) the Department has warned VGS about irregular conditions observed at the locations identified with Counts 10, 21 and 28.⁷⁵

Drawing from the foregoing allegations all reasonable inferences in the Department's favor, I conclude that the NOPV has alleged sufficient facts to state a claim that VGS has violated 49 C.F.R. § 192.481, provided the requisite evidence is adduced to prove the truth of these allegations. Furthermore, the "adequacy" of VGS's monitoring practices for purposes of complying with 49 C.F.R. § 192.481 is a contested question of fact that warrants further discovery at this juncture. Therefore, I deny VGS's motion to dismiss Counts 10, 21 and 28 to the extent they are based on alleged violations of 49 C.F.R. § 192.481.

71. DPS Surreply at 6.

72. NOPV at 2-4.

73. NOPV at 1 and attached DPS Briefing Slides dated 6/1/07 at 11.

74. NOPV at 1.

75. *Id.*

Issue #7:**Request for dismissal -****Failure to state a claim under 49 C.F.R. § 192.613 (continuing surveillance)**

(Counts 5, 9-11, 21-25, 28, 29 and 31)

VGS maintains that in 12 instances, the NOPV fails to state a claim under 49 C.F.R. § 192.613, which imposes a duty of continuing surveillance and observing a protocol for reconditioning or phasing out pipe segments that are in unsatisfactory condition. According to the Company, the NOPV fails to allege that VGS has no procedure for continuing surveillance of its facilities or that the Company has not initiated a program to rectify or phase out segments of pipeline determined to be in unsatisfactory condition.⁷⁶ The Department again counters that this dispute poses a factual question that cannot be adjudicated "until factual development of the record through discovery has occurred."⁷⁷

Having examined the NOPV and its attachments, I observe that Counts 5, 9-11, 21-25, 28, 29 and 31 are supported by photographs that depict alleged conditions which the Department asserts are indicative of repeated failures to properly monitor and take corrective action at these locations on VGS's pipeline system in keeping with the standards of 49 C.F.R. § 192.613. The NOPV further alleges that (1) VGS has undertaken "inadequate monitoring" at the locations identified with Counts 5, 9-11, 21-25, 28, 29 and 31;⁷⁸ (2) the Department has briefed VGS on its understanding of VGS's monitoring obligations under 49 C.F.R. § 192.613;⁷⁹ (3) VGS has failed to effectively implement procedures that support its obligations under 49 C.F.R. § 192.613;⁸⁰ and (4) the Department has warned VGS about irregular conditions observed at the locations identified with Counts 5, 9-11, 21-25, 28, 29 and 31.⁸¹

Drawing from the foregoing allegations all reasonable inferences in the Department's favor, I conclude that the NOPV has alleged sufficient facts to state a claim that VGS has violated 49 C.F.R. § 192.613, provided the requisite evidence is adduced to prove the truth of

76. VGS NOPV Reply at 22.

77. DPS Surreply at 6.

78. NOPV at 2-4.

79. NOPV at 1 and attached DPS Briefing Slides dated 6/1/07 at 14.

80. NOPV at 1.

81. *Id.*

these allegations. Furthermore, the "adequacy" of VGS's monitoring and remedial action practices for purposes of complying with 49 C.F.R. § 192.613 is a contested question of fact that warrants further discovery at this juncture. Therefore, I deny VGS's motion to dismiss Counts 5, 9-11, 21-25, 28, 29 and 31 to the extent they are based on alleged violations of 49 C.F.R. § 192.613.

Issue #8:

Request for dismissal -

Failure to state a claim under 49 C.F.R. § 192.353(a) (location of customer meters and regulators)

(Counts 9, 21, 23, 24, 28 and 29)

VGS maintains that in six instances, the NOPV fails to state a claim under 49 C.F.R. § 192.353(a), which imposes a variety of requirements for installing customer meters and regulators.⁸² The Company argues that this safety standard concerns site conditions for such gas facilities and attendant protection needs existing at the time of their installation. The Company contends that the Department (1) has imported into this regulation a duty of "ongoing surveillance and monitoring" that does not exist under the plain language of the regulation; and (2) has not alleged any facts showing that VGS failed to install these facilities with due consideration for the conditions existing at that time of installation at those locations, to include the potential risk of vehicular damage to the installed facilities.⁸³ VGS maintains variously that at the sites of these six counts, "it would not have been reasonable to anticipate" vehicular damage, and that adequate protection measures were installed, given what the Company knew at the time of installation about the conditions of installation sites, such as the potential risk of ice buildup.

82. The analysis concerning these alleged violations of 49 C.F.R. § 192.353(a) differs from the analysis under this same provision of the Code of Federal Regulations that was discussed as Issue #1 earlier in this Order. *See infra* p. 7-14. Issue #1 concerned whether subject-matter jurisdiction exists for the counts in the NOPV relating to customer-owned, above-ground service pipe, while Issue #8 deals with six alleged infractions concerning the protection of customer meters.

83. NOPV Reply at 23-24.

The Department counters that VGS's objections all raise questions of fact and that the Department's claims "cannot be adjudicated until factual development of the record through discovery has occurred."⁸⁴

Turning to the question of whether 49 C.F.R. § 192.353(a) imposes upon VGS a duty of "ongoing surveillance and monitoring," I agree with the Company that this standard on its face does not expressly prescribe such an obligation. The regulation provides as follows:

§ 192.353 Customer meters and regulators: Location.

Each meter and service regulator, whether inside or outside a building, must be installed in a readily accessible location and be protected from corrosion and other damage, including, if installed outside a building, vehicular damage that may be anticipated. However, the upstream regulator in a series may be buried.

This standard does, however, contemplate that gas facilities will be installed such that they are "protected" from potential damage. VGS argues that the Department has failed to state a claim pursuant to 49 C.F.R. § 192.353(a) because the NOPV contains no allegations that the installations at issue were deficient at the time they were put in place. However, I find VGS's emphasis on timing in reading 49 C.F.R. § 192.353(a) to be misplaced. The crux of this regulation lies in prescribing standards to guide the choice of "location" for installing the facilities – a point that is reflected in the title of the standard: "Customer meters and regulators: Location." Accordingly, to state a claim under this standard, the Department must allege that VGS's chosen locations for the facilities at issue in Counts 9, 21, 23, 24, 28 and 29 are deficient.

Having examined the data spreadsheet in the NOPV and its attachments, I conclude that VGS has not accurately characterized the Department's charges relating to this standard. The Department is not seeking to call VGS to account under 49 C.F.R. § 192.353(a) for failure to adequately monitor the facilities at issue in Counts 9, 21, 23, 24, 28 and 29. Rather, the Department is seeking penalties based on allegations that VGS has installed gas facilities in locations that, the Department asserts, do not protect these facilities "from corrosion and other

84. DPS Surreply at 6.

damage, including, if installed outside a building, vehicular damage that may be anticipated."⁸⁵ The photographs correlating to these six counts depict the following scenes: a detached meter roof (Count 9); a meter with a car and a post nearby (Count 21); a meter and pipe segment under a leaning piece of lumber (Count 23); a meter with nearby tire tracks visibly imprinted on snow (Count 24); a meter with snow buildup (Count 28); and a group of meters and pipes with ice buildup (Count 29). The alleged violations themselves are described in the NOPV as "[i]nadequate piping protection" (Count 9); "[i]nadequate vehicular damage protection" (Counts 21, 24 and 28); "[p]ipe segment not protected from vehicular or other damage" (Count 23); and "[i]nadequate facility protection (ice)" (Count 29). Assuming the truth of these allegations, it would be reasonable to conclude that VGS failed to install these gas facilities in locations in which they are protected from corrosion and other damage, including vehicular damage that could have been anticipated.

Thus, drawing from the foregoing allegations all reasonable inferences in the Department's favor, I conclude that the allegations in the NOPV fairly notify VGS that the Department is contesting the installation locations of the gas facilities at issue in Counts 9, 21, 23, 24, 28 and 29, and that therefore the allegations in the NOPV suffice to state a claim that VGS has violated 49 C.F.R. § 192.353(a), assuming the requisite evidence is adduced to prove the truth of these allegations. Furthermore, the "adequacy" of VGS's installation practices for purposes of complying with 49 C.F.R. § 192.353(a) is a contested question of fact that warrants further discovery at this juncture. Accordingly, I deny VGS's motion to dismiss Counts 9, 21, 23, 24, 28 and 29.

C. VGS's alternative request for suspension of Board Rule 6.100.

In responding to the NOPV on March 30, 2009, VGS moved in the alternative pursuant to Board Rule 6.153 to suspend Board Rule 6.100 and to initiate a rulemaking proceeding to modify and clarify that rule. The Company requested this alternative relief in anticipation of the possibility that its requests for summary judgment and dismissal would be denied. As grounds for suspending the operation of Board Rule 6.100 in favor of a rulemaking proceeding, VGS cited its reasonableness and good faith in interpreting Board Rule 6.100 as not extending subject-

85. 49 C.F.R. § 192.353(a).

matter jurisdiction to customer-owned, above-ground service pipe segments. The Company maintains that "[a]ny attempt to expand the federal regulations to above-ground, customer-owned service pipe raises a host of difficult issues that need to be considered and carefully evaluated."⁸⁶

To date, the Department has not responded to the Company's alternative relief request. In view of my decision denying VGS's request for summary judgment, it is now appropriate to consider the Company's request for alternative relief. I therefore invite comment from the Department as to whether Board Rule 6.100 should be suspended in favor of a rulemaking proceeding as suggested by VGS. The Department should file any comments it wishes to make on this point by November 12, 2009. VGS shall file a reply, if it so chooses, by November 23, 2009.

III. Conclusion

In this Order, I have determined that the Department has properly invoked Section 6.151 of Board Rule 6.100 as a jurisdictional basis for the 31 counts detailed in the NOPV that was served upon VGS on February 27, 2009. While the jurisdictional basis for these counts has been established, for the reasons outlined in this Order, several of the NOPV counts have been partially dismissed for want of sufficient pleading or, because as a matter of law, the allegations supporting these counts fail to state a claim for which the requested relief may be granted. However, Vermont law favors the resolution of claims on their merits, as opposed to dismissal at the pleadings stage of a proceeding.⁸⁷ Therefore, the Department shall have leave to amend the NOPV to reinstate the partially dismissed claims to the extent it is able and wishes to do so.

This Order concludes Phase I of this docket. On or before November 12, 2009, the parties shall submit a joint proposed procedural schedule for Phase II, which shall allow for appropriate discovery and technical hearings on the merits of the remaining claims in this matter.

86. VGS NOPV Reply at 11.

87. See, e.g., *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 13, 184 Vt. 1, 11 (2008)(reversing 12(b)(6) dismissal and noting procedural rules permit amendment to pleadings "so as not to unfairly prejudice the plaintiff before she has any opportunity to develop the case.")

SO ORDERED.

Dated at Montpelier, Vermont, this 23rd day of October, 2009.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: October 23, 2009

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)